Extracts from USACE NEPA Implementing Regulations for Regulatory Program That Set Out Requirement for Independent Review and Authority to Obtain Services From Permit Applicants

1.   The district engineer may require the applicant to furnish appropriate information that the district engineer considers necessary for the preparation of an EIS. 33 CFR 325, App. B, (3); 40 CFR 1506.5.

2.   The statement in Paragraph 1 is true both where the Corps is the Federal lead agency (33 CFR 325, App. B, (8)(b)) or a cooperating agency (33 CFR 325, App. B, (8)(c)).

3.   Information required for an EIS may be prepared by

    a.   The district engineer's staff; or

    b.   A contractor who reports directly to the district engineer, utilizing the procedures at 40 cfr 1506.5(c); or

    c.   Information submitted by the applicant, or a consultant to the applicant.

In all cases, the district engineer should document in the record the Corps' independent evaluation of the information and its accuracy, as required by 40 CFR 1506.5(a). (33 CFR 325, App. B, (f)).

4.   SPK lacks the interdisciplinary staff and manpower to meet the requirement stated at the end of Paragraph three, using either options (a) or (c). This leaves the contracting procedures established under the CEQ's NEPA implementing regulations, articulated in item (b). This regulation expressly allows a cooperating agency, in lieu of the lead agency, to select a contractor in a manner that avoids any conflict of interest.

5.   In order to utilize the authority at 33 CFR 325, App. B, (3), and still ensure the requirement of independence set out at 40 CFR 1506.5(c), the Regulatory program has utilized third party contracts. The applicant contracts for the consultant's services, and then delegates the authority to direct work effort and to receive work product, to the district engineer. The contract stipulates that the consultant may not take direction from the applicant. This allows the district engineer to satisfy the requirement to document that the information or review is independent of the applicant.

Enclosure 1

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